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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Smoketree Holding LLC,

10 Plaintiff,

11 v.

12 Daniel Apke, et al.,

13 Defendants.  
14

No. CV-22-02123-PHX-DLR

**ORDER**

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16 Plaintiff Smoketree Holdings, LLC d/b/a Land Academy brought a ten-count  
17 complaint against Defendants Daniel Apke (“Dan”), Ron Apke (“Ron”), and Land  
18 Investing Online (“LIO”). (Doc. 1.) Defendants filed a partial motion to dismiss (Doc.  
19 18), which the Court granted in part (Doc. 39). Specifically, the Court dismissed Land  
20 Academy’s (1) state and federal misappropriation of trade secrets claims due to the  
21 failure to adequately plead a trade secret; (2) conversion, civil conspiracy, tortious  
22 interference with contractual relations, and unjust enrichment claims because, as pled,  
23 they were preempted by Arizona’s trade secrets statute, and (3) copyright infringement  
24 claims based on Land Academy’s voluntary withdrawal of the claims. The Court denied  
25 Land Academy’s barebones request for leave to amend because it did not comply with  
26 Local Rule of Civil Procedure 15.1(a) or this Court’s standard order discouraging  
27 motions to dismiss (Doc. 12). But the Court allowed Land Academy to renew its motion  
28 for leave to amend in a compliant manner.

1 Now before the Court is Land Academy's renewed motion for leave to amend  
2 (Doc. 43), which is fully briefed (Docs. 44, 45).<sup>1</sup> A party seeking to amend a pleading  
3 after the date specified in the scheduling order first must show good cause for modifying  
4 the scheduling order. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th  
5 Cir. 1992). If good cause supports deviation from the scheduling order, the Court then  
6 assess the propriety of the motion for leave to amend by considering factors such as bad  
7 faith, undue delay, prejudice to the opposing party, futility of amendment, and whether  
8 the complaint previously has been amended. *See Allen v. City of Beverly Hills*, 911 F.2d  
9 367, 373 (9th Cir. 1990). Absent of any of these reasons, leave to amend should be freely  
10 given. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

11 Defendants oppose Land Academy's motion for four reasons: (1) Land Academy  
12 failed initially to follow this Court's procedure for seeking leave to amend and (2) has  
13 failed to show good cause for amending the scheduling order, (3) leave to amend would  
14 prejudice Defendants, and (4) the proposed amendments are all futile. (Doc. 44.) The  
15 Court is unpersuaded.

16 First, although Land Academy admittedly failed to follow the Court's amended  
17 procedures the first time around, it explains that its failure was due to a good faith  
18 misunderstanding of the procedure. The Court finds no bad faith on Land Academy's  
19 part.

20 Second, the Court finds good cause to permit amendment after the deadline set  
21 forth in the scheduling order because Land Academy diligently moved for leave to amend  
22 after receiving this Court's order explaining that its complaint and its barebones request  
23 for leave to amend were deficient.

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25 <sup>1</sup> Defendants move for leave to file a sur-reply. (Doc. 48.) The Local Rules do not  
26 provide for sur-replies, and because sur-replies are highly disfavored, courts generally do  
27 not allow them absent extraordinary circumstances, such as to respond to new evidence  
28 or arguments raised for the first time in a reply brief. *See Sims v. Paramount Gold and Silver Corp.*, No. CV 10-356-PHX-MHM, 2010 WL 5364783, at \*8 (D. Ariz. Dec. 21, 2010). Defendants motion is denied because they have not shown extraordinary circumstances justify a sur-reply. The arguments contained in Land Academy's reply brief are not impermissible new arguments; they are permissible rebuttable to points raised by Defendants in their response brief.

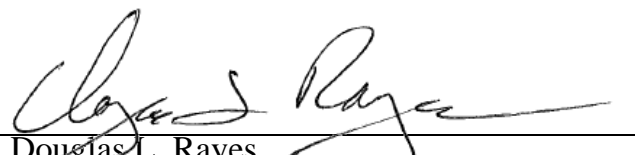
1 Third, the Court does not find Defendants will be prejudiced by the amendment.  
2 Prior to the Court's dismissal order, the parties had already engaged in substantial  
3 discovery based on Land Academy's original complaint. Land Academy's proposed  
4 amended complaint includes no new claims that would require separate discovery that  
5 varies from the discovery that already should have been done based on the original  
6 pleading. Further, the Court retains discretion to extend or reopen discovery if  
7 Defendants can show it is necessary based on the amended pleading.

8 Lastly, the proposed amendments are not futile. Land Academy has rectified the  
9 Court's concerns regarding its trade secrets claims by pleading specific categories of  
10 information that plausibly could be considered trade secrets. Defendants' futility  
11 arguments largely concern matters outside the pleadings. But when assessing the  
12 sufficiency of a complaint, the Court does not consider extra-pleading material. Instead, it  
13 accepts as true well-pled factual allegations and construes them in the light most  
14 favorable to the plaintiff. *See Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).  
15 Land Academy also has rectified the Court's concerns regarding its state law torts claims  
16 by clarifying that those claims are brought in the alternative, in the event any of its  
17 alleged trade secrets are found to fall into the less protected category of "confidential  
18 information." In that alternative scenario, Arizona's trade secrets statute would not  
19 preempt the tort claims. Accordingly,

20 **IT IS ORDERED** that Land Academy's motion for leave to amend (Doc. 43) is  
21 **GRANTED**. Land Academy shall file its amended complaint by no later than **February**  
22 **27, 2024**.

23 **IT IS FURTHER ORDERED** that Defendants' motion for leave to file a sur-  
24 reply (Doc. 48) is **DENIED**.

25 Dated this 23rd day of February, 2024.

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Douglas L. Rayes  
United States District Judge